

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OVERWELL HARVEST LIMITED, a
British Virgin Islands company,

Plaintiff,

vs.

DAVID WIDERHORN and PAUL
GIEDRAITIS,

Defendants.

No. 17 C 6086

Chicago, Illinois

September 7, 2017
3:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. SARA L. ELLIS

APPEARANCES:

For the Plaintiff:

MR. JOHN J. SCHARKEY
MR. ROBERT D. SWEENEY
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Chicago, Illinois 60602

For the Defendants:

MR. WILLIAM CHOSLOVSKY
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PATRICK J. MULLEN
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 1412
Chicago, Illinois 60604

1 THE CLERK: 2017 C 6086, Overwell Harvest Limited
2 versus Widerhorn, et al.

3 MS. SCHARKEY: Good afternoon, Your Honor. John
4 Scharkey, S-c-h-a-r-k-e-y. I represent the plaintiff, Overwell
5 Harvest Limited.

03:07:26

6 MR. SWEENEY: Robert Sweeney, S-w-e-e-n-e-y, also on
7 behalf of plaintiff.

8 MR. CHOSLOVSKY: Good afternoon, Judge. Bill
9 Choslovsky and Mike Neville on behalf of the defendants.

03:07:35

10 THE COURT: All right. Good afternoon. So we are
11 here on the continued TRO. I read the reply that the plaintiff
12 filed along with the exhibit. All right. So having read
13 everything, I have some specific questions. It's my
14 understanding that it's the defendants' position that the
15 August 16th e-mail constituted sufficient notice of a
16 stockholder meeting to vote either under Delaware law or the
17 bylaws, but then there is an August 23rd e-mail from
18 Mr. Widerhorn that states:

03:08:07

19 "When it comes time to vote on the final asset
20 purchase agreement terms, we will do so with the proper notices
21 and formalities stipulated by our bylaws and Delaware law."

03:08:36

22 So if the August 16th e-mail constituted sufficient
23 notice, why on earth would Mr. Widerhorn say: When it comes
24 time to vote, we will do it with proper notice?

03:09:03

25 MR. CHOSLOVSKY: Judge, a couple responses. Number

03:09:31

1 one, yes, it is our formal legal position that notice was given
2 on the August 16th date as you said. Our second position, we
3 have two other things to say in that regard. Number one, then
4 after that in an abundance of caution on August 25th, he sent
5 another notice to all shareholders giving a deadline to vote
6 and stating:

7 "I am pleased to announce that TT has considerably
8 improved the terms of the transaction."

03:09:47

9 So the short answer to your question is on August
10 25th, even if you're going to neglect the August 15th notice,
11 no later than August 25th notice was given.

12 Now, there's two other --

13 THE COURT: Well, so then your answer to my question
14 is that the August 16th e-mail didn't constitute proper notice.

03:10:09

15 MR. CHOSLOVSKY: All right. My answer is if it didn't
16 constitute proper notice that the --

17 THE COURT: Well, no, it's either it did or it didn't.
18 So you're going to take a position that: Yeah, it did, and
19 here's why it constituted proper notice.

03:10:22

20 Then, you know, you can say: I don't know why he sent
21 that e-mail afterwards, but it did.

22 To me, it makes no sense, the later e-mail on August
23 23rd which says: When it comes time to vote, I'm going to give
24 everybody proper notice, and I'm going to do everything in
25 accordance with the bylaws and Delaware law.

03:10:43

1 MR. CHOSLOVSKY: He did the -- so the short answer is,
2 no, notice was not sufficient on August 15th.

3 THE COURT: Okay.

03:10:58

4 MR. CHOSLOVSKY: On August 25th, formal notice was
5 given. The more important part of the discussion is that it's
6 ultimately a red herring. It's ultimately irrelevant.

03:11:32

7 THE COURT: It's not a red herring. If on August
8 25th, if we start the clock on August 25th, then the vote on
9 September 5th is premature. It's 20 days. The notice is 20
10 days. So if the August 25th e-mail constitutes proper notice,
11 and I don't know if that's plaintiff's position or not, then
12 August -- I'm sorry -- September 5th falls before the 20-day
13 notice period and the vote is not proper.

03:11:59

14 MR. CHOSLOVSKY: When you say the vote is not proper,
15 Your Honor, it's no different than our presidential election.
16 If you can vote until September 15th, if you choose to vote one
17 second later, there's two components to that. Number one, 97
18 percent of the eligible votes were cast.

03:12:23

19 THE COURT: You can't. That's not how the law reads,
20 right? It's not -- the notice is not that it's open voting.
21 So here's the notice, and you can vote anytime up until 20
22 days. The notice has to say here's the date when the vote is
23 going to occur, the time when it's going to occur, the place
24 that it's going to occur, and the means by which it is going to
25 occur. It's not open season. There's no such thing as early

03:12:52

1 voting. You can't do that.

2 So the fact that 97 percent of the -- this poll is
3 somewhat ambiguous to me as to whether that is a vote, not a
4 vote, a suggestion as to what people think. I'm not sure what
03:13:31 5 that is, but the bylaws and Delaware law don't say anything
6 about allowing early voting. What they do say is that you have
7 this 20-day notice period and at that point that's when you can
8 set the vote. September 5th, even taking August 25th as the
9 notice date, September 5th is too early.

03:14:10 10 MR. CHOSLOVSKY: Well, we have the order that we
11 entered by agreement on August 24th, and I think this is
12 particularly relevant. What's going on here is the company,
13 Neurensic, is attempting to sign a non-binding term sheet, a
14 non-binding term sheet. So even if -- arguably, this order
03:14:37 15 doesn't even stop that, because the August 24th order that we
16 entered by agreement says two things, number one:

17 "No sale of the company's assets shall take place in
18 the next 14 days."

19 That did not happen.

03:14:51 20 The second thing it says is:

21 "In the event any offer is made to purchase all or
22 substantially all of the company's assets" -- which happened --
23 "defendants shall provide all notices and disclosures required
24 under the company's bylaws and applicable Delaware law."

03:15:06 25 They did that on August 25th. So when we really cut

1 to the chase, it almost strikes me as falling under the heading
2 of no good deed goes unpunished. Anybody is still welcome to
3 vote. I mean, the remaining 3 -- I mean, it falls under the
4 heading of a folly. The remaining 3 percent that hasn't voted,
03:15:28 5 no sale is going to take place before September 14th. In fact,
6 we have an affidavit that was sent over by the folks from the
7 potential buyer which I'd like to introduce. The most
8 significant point is they point out in there:

9 "To be clear, the term sheet does not complete the
03:15:48 10 transaction. Instead, the proposed timeline for completing the
11 transaction is as follows:

12 "The term sheet executed by September 8, 2017" --
13 which again if we wanted to take an aggressive position, I
14 believe we could have done that at any juncture.

03:16:03 15 "2. A binding purchase agreement executed by
16 September 13, 2017.

17 "3. Closing meaning transaction is funded by
18 September 20, 2017."

19 So, you know, arguably what we're here talking about,
03:16:21 20 the term sheet is a non-binding term sheet that doesn't bind
21 the company in the first place.

22 THE COURT: No, what we're talking about is a vote.
23 We're not talking about the term sheet. We are talking about
24 the stockholder vote and the process by which any sale is going
03:16:40 25 to move forward. That's what we're talking about, and it's

1 very clear in my opinion anyway -- and mine is really the only
2 one that counts -- that the two directors have not abided by
3 the notice provisions that they were supposed to abide by in
4 the bylaws and under Delaware law, and then by agreement said
5 they were going to abide by. That's what it comes down to.

03:17:18

6 Holding the vote on September 5th, even if the notice
7 went out on August 25th, is not 20 days. You can count it any
8 way you want to, and it's not 20 days. That is the crux of the
9 TR0. Now, Trading Technologies is most likely, as they have
10 been talking to Neurensic since May, right?

03:17:59

11 MR. CHOSLOVSKY: Since May.

12 THE COURT: So they're not going anywhere in reality.

13 MR. CHOSLOVSKY: I hope you're right, Judge.

14 THE COURT: They can, you know, set these particular
15 dates, but Trading Technologies is a business that has been
16 around a long time. I've had cases with Trading Technologies
17 that have listed a long time, so I know that they're not going
18 anywhere. They can certainly wait to ensure that the vote
19 occurs 20 days from August 25th and then can go forward.

03:18:08

20 There will not be irreparable harm to the defendants
21 in light of the fact that they have been talking to Trading
22 Technologies for months about this, but there is irreparable
23 harm if I allow this to go forward in violation of Delaware
24 law, in violation of the bylaws, and it could be that in the
25 end we get to the same result, right?

03:18:39

03:19:07

03:19:37

1 It can certainly be that Overwell doesn't have the
2 votes to stop the sale. It can be that Overwell can't find
3 anybody else, can't find another buyer who would bring in more
4 money, and that's the whole point of this. It's that the
5 plaintiffs have to have the ability under the law to make sure
6 that they've exhausted the ability to maximize any sale of the
7 company and get back or reap as much of their investment into
8 the company as possible.

03:20:13

9 It might very well be that Trading Technologies is the
10 best out there in terms of the sale, but Overwell needs to have
11 the opportunity to beat the bushes and get somebody else in so
12 that they don't take a loss.

03:20:37

13 MR. CHOSLOVSKY: A couple things, Judge. I would
14 like -- since this is an evidentiary hearing, I'd like to put
15 on a witness for you. That's number one. Number two, if your
16 premise is correct, we're foolish to be expending so much time
17 when all we need to do is renote and give a few more days,
18 and then as you said perhaps we'll be in the exact same
19 position. I'm just going to read to you one paragraph from
20 TT's affidavit. The suggestion that it's self-serving, I hope
21 you're right. They wrote:

03:21:00

03:21:17

22 "Practically speaking, the company represents a very
23 rapidly wasting asset for several reasons. We understand that
24 most of the employees in place when TT submitted its indicative
25 offer in May are no longer employed by the company and that no

03:21:37 1 employee has been paid in several months. Its customers are
2 aware that the company is rapidly facing a liquidation event
3 and is effectively out of business. Nuerensic has also advised
4 TT that most of the contracts expire throughout the month of
5 September 2017 and it is highly probable that those customers
6 will not renew their accounts. Hence, time is of the essence
7 to complete the contemplated transaction. In the event that TT
8 is not able to complete the transaction immediately, then TT
9 will either, A, not complete the transaction at all and simply
03:21:55 10 build and deploy our own solution to the market or
11 alternatively, B, will very substantially reduce our price to
12 reflect the rapidly decreasing value of these orphaned assets."

13 I would like to put a witness on because the most
14 important factor, Judge, is yesterday -- and I'm going to put
03:22:18 15 it politely -- you were fed a bill of goods in this sense. You
16 were told this case begins, that the complaint begins with
17 Exhibit A on August 15th, and then an August 18th, I think,
18 e-mail at 3:51 in the morning. So August 15th, their complaint
19 begins as if this case begins on August 15th.

03:22:37 20 They are either so extremely misinformed or extremely
21 disingenuous -- and this is why I want to put on a witness --
22 that starting more than a year ago when the plaintiff invested
23 its second million dollars with a number of conditions, the
24 most important condition the plaintiff in July of 2016 insisted
03:22:56 25 on is that you sell the company as soon as possible. Then more

03:23:20 1 than a year's worth of efforts went on in that regard. I've
2 got a whole binder of the e-mails showing their client, A,
3 insisted the company be sold and, B, getting updates of all
4 these sales efforts, including the May 10th first offer by TT.
5 So the whole suggestion that this is premised on them being in
6 the dark borders on the frivolous, to put it politely.

03:23:55 7 THE COURT: But we're here because there was no proper
8 notice given. Had your clients given proper notice along the
9 way, whether it was August 16th, August 18th, whenever it was
10 back in May, we wouldn't be here. We wouldn't be here.

11 MR. CHOSLOVSKY: But the suggestion that they didn't
12 have notice, what we are calling proper notice is the
13 definition of form over substance.

03:24:12 14 THE COURT: My point is that there are specific
15 requirements under the law and specific requirements in the
16 bylaws. We can call it form over substance; however, they all
17 have a purpose. If you don't meet it, then it's not notice.
18 Notice is not: Hey, I'm kind of thinking about selling the
19 company to this guy. What do you think?

03:24:46 20 It is: We have an offer. Here are the terms. Here's
21 when the vote is going to take place. Here's all the
22 information you need to decide on the vote. Here's the where,
23 the when, and the how of the vote.

03:25:13 24 MR. CHOSLOVSKY: And, Judge, this is worth reading to
25 you. On August 25th, our client sent the following e-mail to

1 the plaintiff and all the shareholders:

03:25:28

2 "I'm pleased to announce that TT has considerably
3 improved the terms of the transaction after our meeting today
4 and has submitted their best and final term sheet which I
5 attached below. Unfortunately, TT has set a deadline of
6 Tuesday to accept and has explained to me unequivocally that
7 there is no leniency in this. The term sheet provides a
8 reasonable closing price."

03:25:42

9 Then he goes through the terms.

10 "I have instructed our attorneys to reach out to OHL's
11 attorneys" --

12 THE REPORTER: Counsel, it's too fast.

03:25:52

13 MR. CHOSLOVSKY: "I have instructed our attorneys to
14 reach out to OHL's attorney and request an emergency board
15 meeting to consider and vote on the term sheet and, if
16 successful, to dismiss the current injunction. Furthermore,
17 assuming we are successful in reaching board approval, so this
18 weekend, management will be available on Monday to respond to
19 any questions and concerns."

03:26:07

20 Then he continues, and this is in bold:

21 "It is extremely important that all shareholders vote
22 ASAP" --

23 THE REPORTER: Counsel, it is too fast.

24 MR. CHOSLOVSKY: Okay.

03:26:16

25 "It is extremely important that all shareholders vote

03:26:39

03:27:02

03:27:22

03:27:55

03:28:21

1 ASAP once the polling opens even if the majority needed to pass
2 the vote is reached. Under normal conditions, Delaware law and
3 the bylaws require 20-day notice to vote. However, given the
4 timetable enforced by TT, once the term sheet is accepted, we
5 need to close within 14 days or the deal will be permanently
6 canceled. To accomplish this, we need to have everybody who is
7 a shareholder's vote counted within the 14 days regardless of
8 whether it is in favor or against. Otherwise, we will have to
9 wait until September 14, 20 days from today's official notice,
10 to officially close the deal, assuming, of course, at least a
11 majority of the votes has voted, and TT may not be willing to
12 do so. We will follow up after the OHL board meeting with the
13 link to the electronic polling for voting as well as the open
14 phone dial-in for questions to management."

15 THE COURT: In hearing all of that, they got some bad
16 advice. You know, it says in the attachment to your response:
17 "Written notice of a stockholder vote and all material
18 facts concerning the proposed transaction was disclosed in an
19 e-mail communication on August 25 setting the deadline for
20 stockholders to vote on the proposed transaction on September
21 14, 2017."

22 That was 20 days. That's when the vote should have
23 occurred. Instead, your clients decided to hold the vote on
24 September 5th. They knew, certainly after having been in the
25 courtroom on our first hearing, that the issue was this 20-day

1 notice, and then they enter into an agreement with Trading
2 Technologies that requires them to hold the vote before 20 days
3 and close. That's stupid.

4 MR. CHOSLOVSKY: It's at TT's insistence.

03:28:51

5 THE COURT: It's a negotiation, right? There are
6 things that are non-negotiable in different negotiations.
7 Certainly, they could have gone to TT and said: We can't do it
8 before September 14th, particularly because we were just in
9 court on this very issue.

03:29:15

10 They could have through counsel reached out to the
11 lawyer for Overwell and said: Look, this is it. This is the
12 best we can do. Trading Technologies is going to walk. Would
13 you agree? You've been given the notice. Would you agree to
14 hold the vote on September 5th? Here's everything. Here's all
15 the information. Let's settle this case.

03:29:46

16 That could have been done, too, but it wasn't done.
17 So, you know, I just don't see where defendants have a leg to
18 stand on when it comes to the notice.

03:30:15

19 MR. CHOSLOVSKY: The notice, I mean, if we really cut
20 to the chase and I say, Judge, let's assume notice was not
21 proper, that there's no way that September 5th is the same as
22 September 15th, and it's not proper even if you reset the clock
23 as of August 25th, we're here on a TRO. They still have to go
24 four for four and show irreparable harm and an inadequate
25 remedy at law.

03:30:40

1 Now, this is a company. Again, I'm happy to put on
2 the founder of the company, the wiz kid who graduated from MIT
3 at the age of 19. I'm happy to put him on, and we can walk
4 through the corporate documents which they've never even
03:30:58 5 suggested are inaccurate that the founder controls way more
6 than 90 percent of the vote. So the notion of -- we could have
7 notice on a gold-sealed old-fashioned embossed something, and
8 we could do it with trumpets and we could give 200 days.

9 THE COURT: I'm not asking for trumpets. I'm not
03:31:21 10 asking for anything to be embossed by a gold seal or anything
11 else. I am asking, as are plaintiffs, that the defendants
12 follow what they are required to do by law. That's all.

13 MR. CHOSLOVSKY: So where are the damages?

14 THE COURT: The damages are that if they do not have
03:31:44 15 the full 20 days, they are losing the time and the ability to
16 find other buyers, better buyers. If at the end they don't
17 find them, then they don't find them, but they are entitled to
18 that under Delaware law. That's what they're entitled to.

19 MR. CHOSLOVSKY: And if it's futile, I appreciate the
03:32:11 20 candor of telling me, but I'm prepared to put on a witness
21 stating they've had 400 days to find an offer. They're the
22 ones who insisted the company be sold. Again, it's the epitome
23 of misinformation. We can go through the e-mails showing that
24 as a condition to put forward their second million dollars,
03:32:40 25 they said you must immediately try to sell the company. That

1 was 14 months ago.

2 THE COURT: What you're asking me to do is basically
3 say: It really doesn't matter what the requirements are under
4 Delaware law. You know, if you could have found a buyer, you
03:33:03 5 should have done that before today. You haven't done it, so
6 too bad for you, and the requirements under Delaware law don't
7 mean anything.

8 The last time I checked, I'm a judge, and it is my
9 obligation, even if the result will end up the same, to make
03:33:25 10 sure that people meet their obligations under the law. Your
11 clients certainly by August 25th knew what their obligations
12 were, and the fact that they chose to hold a vote before 20
13 days is on them. There were other things they could have done,
14 and they chose not to do that. You can't get around it. Under
03:34:05 15 the likelihood of success on the merits, the plaintiffs are
16 likely to succeed on that claim.

17 MR. CHOSLOVSKY: They have to show damages, and they
18 have to show an inadequate remedy at law.

19 THE COURT: Exactly, and the damages is that -- first
03:34:25 20 of all, there is jurisdiction. It meets the jurisdictional
21 amount. There are damages, and there is an inadequate remedy
22 at law in that if they are denied the ability to have those
23 extra days to find a buyer, they can't get that back. So you
24 can't redo the vote or redo what was done and go backwards.
03:35:02 25 They can't do that.

1 MR. CHOSLOVSKY: So if I could show you as a
2 metaphysical certainty that the harms here, the weighing of the
3 harms, on the one hand, the harm is if you take TT's affidavit,
4 which is that they're going to walk, and I'll put my client on
03:35:20 5 stating they're going to walk and that's why he shorthand the
6 notice, not because he wanted to, but because he had a gun to
7 his head and was told: This is the deal or else. Why should
8 we pay for something we could get for free?

9 So if I can prove as a metaphysical certainty to you
03:35:40 10 that on the one hand this deal will evaporate, so that's the
11 harm to the defendants, that taxes won't be paid, back wages
12 won't be paid, that these assets will generate zero as a
13 result, that versus on the other hand their harm when they only
14 control less than 5 percent of the votes, so they couldn't stop
03:36:03 15 a sale even if they wanted to, that in that instance somehow
16 the harm weighs -- and that they have to go four for four, that
17 the harm weighs in favor of them, I am prepared to put on a
18 witness to make that showing.

19 THE COURT: You can put on the witness if you want to.
03:36:21 20 I never stop anybody from making their full case, and you can
21 certainly put the witness on.

22 What would plaintiffs like to address in terms of
23 irreparable harm and an adequate legal remedy?

24 MS. SCHARKEY: Your Honor, in terms of the irreparable
03:36:43 25 harm, in addition to what Your Honor has articulated, it's the

03:37:05

1 proprietary nature of the technology. If the plaintiffs can
2 put together a consortium of investors that can outbid TT and
3 they don't have that opportunity, they're deprived of that,
4 too. That cannot be quantified. You can't give that back with
5 money. That's gone. So that's an additional dimension of the
6 irreparable harm that we'll suffer if this relief is not
7 granted.

03:37:22

8 MR. CHOSLOVSKY: So, Judge, trying to be a pragmatist,
9 I have a different question. If the notice runs as of August
10 25th to take you to September 15th, again since this
11 transaction will never be -- a purchase agreement won't even be
12 signed before then, is there any reason we can't extend the
13 period of voting through September 15th?

03:37:40

14 I mean, they've been on notice of this. Again, if I
15 put on testimony, they've been on notice because it's been at
16 their demand to sell the company for 400 days. They've been on
17 notice since May 10th that TT has made an offer, and nothing
18 has been done.

03:38:01

19 So to smoke out that this is again a hostage or
20 extortion action, they've known since August 25th. So is there
21 any reason we can't say the vote closes September -- the vote,
22 which again they control less than 5 percent of the votes, that
23 the vote closes September 15th?

03:38:23

24 Great, nobody would love to see them after 400 days
25 find a higher and better offer. If that's the case, that's

1 something we would consider because there's no reason to try to
2 make a case if the answer is, sure, let's extend the voting to
3 September 15th.

4 MR. SWEENEY: On that point, Your Honor, I'll make a
03:38:44 5 couple points. First, I think the affidavit he just read said
6 that there would be a sealed agreement on September 13th.
7 That's what the affidavit that I think he just read said.
8 Beyond that, this is not something Overwell can waive. There
9 are 23 shareholders. Now, we're the ones that have jumped up
03:39:02 10 and said we want our 20 days' notice, but we can't just come in
11 here and say don't apply Delaware law. We've got 12 other
12 shareholders that never voted in the poll.

13 Secondly, as you point out, this is not something
14 where you can just leave it open. There's a reason why we have
03:39:19 15 rules with regard to quorums. You have to have a quorum. If
16 you've just got an open poll, you know, was there a quorum?
17 Well, there wasn't one on Monday or Tuesday or Wednesday when
18 they voted, but there was on Thursday. That's not how it
19 works. You have to show up with proxies. You have to have the
03:39:38 20 votes represented at the meeting. Like you said, it has to be:
21 Here's what the vote is going to be about. Here's the
22 resolution. Here's the date, here's the time, and here's how
23 we're going to do it.

24 If they're going to do it remotely, we have to -- I
03:39:50 25 mean, there's so many provisions of these bylaws that they

1 violated. 1.6 says they have to leave a list on an electronic
2 network where everyone can see the shareholders that are voting
3 during the course of the meeting. That never happened. The
4 quorum section says it has to have date, time, and place, and
5 we have to have proxies in writing.

03:40:07

6 I mean, there's at least four sections in the bylaws
7 that we pointed out to them before today that they were in
8 violation of. We were in the hallway yesterday, and when we
9 came up to you we were surprised because we thought they're
10 going to give a proper notice now, we're going to have our 20
11 days, and that will be it. Instead, what happened was someone
12 wanted to have a hearing.

03:40:20

13 This is not a complicated case in terms of the notice
14 part. There might be a lot of other complicated issues down
15 the road, but the notice part is not complicated. They haven't
16 complied, and we don't agree frankly that -- I mean, we're not
17 looking to complicate things, but the August 25th e-mail does
18 not say how, when, where, why a meeting is going to take place.
19 I mean, it's hard to believe. They read it, but he flat out
20 said "however, given the timetable, once the term sheet is
21 accepted, we need to close within 14 days," essentially
22 admitting that this isn't adequate notice. This is not what
23 you need.

03:40:40

03:40:57

24 Now, what we were going to put on if the case came
25 about -- and it's referenced in the papers -- was there were

03:41:12

1 directors' meetings where Mr. Widerhorn did send around WebEx
2 call-in numbers, WebEx ID numbers that you had to put in,
3 security numbers that you had put in to have the call, the date
4 and time, not only in Chicago time but Hong Kong time. He did
03:41:35 5 provide proper notice of those. He knows how to do it. It
6 just hasn't happened.

7 Frankly, our guys have put up \$3.5 million. So, yes,
8 we've known that they're trying to sell it, but what surprised
9 everybody was when on August 16th we were told it's going to be
03:41:57 10 sold for about 2 to 400 grand. That's 10 percent of our
11 investment, a million dollars of which we put up in February of
12 this year. So might these people be interested in saying
13 first: Slow down. What's happening? We need to know what's
14 going on.

03:42:15 15 Then secondly, if there is going to be a vote, we need
16 time to digest this to see if maybe there's going to be a
17 consortium or if this is the best option. That didn't happen.

18 MR. CHOSLOVSKY: Judge, they put up their second
19 million dollars not in February of this year. They put it up
03:42:32 20 in June through August of 2016. Ultimately, this gets to one
21 prong of the analysis, which is -- well, I guess, two prongs,
22 inadequate remedy at law, meaning if these assets are being
23 sold for way, way too cheap, which also is another
24 misstatement. They're not being sold for 200 to \$400,000 in
03:42:55 25 the term sheet. There's an earnout of eight times of 2018's

1 revenues. So that's the only way their clients are potentially
2 getting paid.

3 But ultimately it comes down to inadequate remedy at
4 law. If they want to sue TT for buying a very valuable asset
03:43:15 5 on the cheap that they couldn't find anybody else to buy, and
6 we after 400 days haven't found anybody better, they have that
7 remedy. If they want to sue these defendants and add counts
8 for some breaches of fiduciary duties, they can do that.

9 But ultimately notice is not damage in and of itself.
03:43:32 10 Their damages are by definition speculative. They have to show
11 their damages.

12 THE COURT: And when you are seeking an injunction,
13 particularly for something that, you know, is ongoing right
14 now, if I were to say go ahead, it's fine, from September 5th
03:43:56 15 to September 14th they were denied those 11 days -- or nine
16 days, I guess, in which to find other, better buyers and
17 present that to the other stockholders. Again, maybe they
18 won't, but we don't know until September 14th comes and goes
19 and they don't have anybody. That is the damage. That is the
03:44:37 20 damage.

21 MR. CHOSLOVSKY: The potential that they can find
22 somebody.

23 THE COURT: Yes.

24 MR. CHOSLOVSKY: So in that regard is the suggestion
03:44:51 25 no sale until after September 14th?

03:45:23

1 THE COURT: You can't vote until September 14th, and
2 then you can vote. This is assuming that I find that August
3 25th constituted sufficient notice. If I don't find that, it
4 would be that you could send out notice today. You would have
5 20 days from today and hold the vote. People will vote the way
6 they vote. It will be done in accordance with the bylaws and
7 Delaware law, the result comes out, and then you sell the
8 company or you don't.

03:45:46

9 MR. CHOSLOVSKY: So on the irreparable harm notion, in
10 terms of putting on a witness to show that they've had notice
11 for 400 days, they have been unable to --

12 THE COURT: It's not -- you're not using notice
13 properly, right?

03:46:01

14 MR. CHOSLOVSKY: Okay. They have not found a buyer in
15 400 days or done anything on their own, so the suggestion of
16 damages that --

03:46:22

17 THE COURT: But there are lots of -- you are
18 conflating all sorts of things. The whole purpose of the
19 Delaware law and the bylaws is that when the directors decide
20 that they want to sell substantially all of the assets of the
21 company, the stockholders, first of all, have to have notice of
22 a particular sale, the terms of a particular sale, that they
23 have all the material information as to whether the directors
24 are going to get positions in the new company, whether they
25 would be consultants, whether they are going to be treated

03:46:51

1 differently than any of the other stockholders. They're
2 entitled to all of that information in addition to the ability
3 to put together something that is a better offer than what's on
4 the table so that they can recoup as much of their investment
5 as possible.

03:47:12

6 MR. CHOSLOVSKY: And do they have a burden to show
7 that they've tried to do anything whatsoever to try to find an
8 offer, meaning so that these damages aren't speculative?

9 THE COURT: No, they do not.

03:47:24

10 MR. CHOSLOVSKY: Okay. I have nothing further, Judge.

11 MR. SWEENEY: There's one thing, Your Honor. I know
12 that you've got our papers and you've got defendants'. I don't
13 believe the August 25th e-mail that counsel read from is a part
14 of those records. The defendants in their brief said they were
15 maintaining that these were confidential, even though they were
16 sent out to a long list of people, so they didn't actually
17 include the actual e-mail that was read to you today. If
18 that's the one that they're going to say is notice, we would
19 like to submit it to the Court as an exhibit today so that you
20 have the full document.

03:47:49

03:48:09

21 THE COURT: All right. Do you have a copy of that
22 e-mail?

23 MR. SWEENEY: We do.

24 THE COURT: We can make sure that that e-mail -- well,
25 why don't you -- you can just put it on the docket as an

03:48:25

1 additional exhibit but under seal.

2 MR. SWEENEY: Okay.

3 THE COURT: I believe that that has confidential
4 information, financial information in it, right?

03:48:42

5 MR. CHOSLOVSKY: Well, the confidential information
6 was that we had kept confidential who the potential buyer was,
7 but in their complaint they revealed who the potential buyer
8 was. So that train left the station when they filed the case
9 in terms of who Trading Technologies is.

03:49:00

10 I guess since this is about 20 days, the question is:
11 Does the clock start? I guess we need a ruling on whether the
12 clock starts on August 25th when the offer -- when this e-mail
13 was sent to all shareholders and attached to it was a copy of
14 the term sheet from TT, or whether the clock hasn't started
15 starting ticking yet, so send a new notice and get it right and
16 see if TT sticks around.

03:49:31

17 THE COURT: So why don't I take a look at the e-mail.

18 MR. CHOSLOVSKY: (Handing document to the Court.)

19 THE COURT: Thank you.

03:49:49

20 MR. CHOSLOVSKY: While you're studying that, Judge, if
21 you want, counsel can huddle between us for a moment.

22 THE COURT: Sure.

23 MR. CHOSLOVSKY: Thank you.

24 (Recess.)

03:57:31

25 THE COURT: Yes?

1 MR. CHOSLOVSKY: We came to no agreements of any sort,
2 Judge.

3 THE COURT: Okay. So I take it that it's plaintiff's
4 position that this August 25th e-mail does not constitute
5 proper notice.

03:57:50

6 MS. SCHARKEY: Correct.

7 THE COURT: I agree. Under the bylaws, there should
8 be written notice that states the place, the means of remote
9 communication by which stockholders and proxy holders may be
10 deemed to be present in person and vote, the date and time of
11 the meeting, the purpose for which the meeting is called. Then
12 under Delaware law there's also requirements, additional
13 requirements for the record date for determining the
14 stockholders entitled to vote at the meeting.

03:58:14

15 So this e-mail, I think, complies with some of the
16 requirements. It certainly gives the purpose of the meeting.
17 I think there's an issue with the polling, that that is
18 ambiguous and doesn't give sufficient information as to who is
19 allowed to vote, how they're going to vote, and the time and
20 place at which they're going to vote. So I will give you this
21 back.

03:58:49

03:59:38

22 MR. NEVILLE: Thank you.

23 THE COURT: So obviously by this point defendants know
24 what's required by the notice, and they can send out the notice
25 today. If they send it out today, then 20 days from today

04:00:04

1 would be the 27th of September, which would be the date of the
2 vote, and then you can go from there. So I am going to grant
3 the TRO in part. I find at least as to the notice claim that
4 plaintiffs have a likelihood of success on the merits.

04:01:17

5 With regard to jurisdiction, I find that jurisdiction
6 is proper. I have jurisdiction, diversity jurisdiction over
7 the Delaware state law claims, because the defendants reside in
8 Illinois and Overwell is a foreign company with a foreign place
9 of business and alleges damages that exceed the threshold

04:01:38

10 amount. Personal jurisdiction is proper because defendants
11 reside in Illinois and are alleged to have acted in Illinois as
12 it relates to the claims.

13 With regard to the sale terms and any other employment
14 or consulting agreements, the plaintiffs have the term sheet
15 because that was attached to the August 25th e-mail, is that
16 right?

04:02:16

17 MR. SWEENEY: We do.

18 THE COURT: Okay.

19 MR. SWEENEY: It was actually -- not to get into the
20 weeds, but that was actually rejected.

04:02:27

21 THE COURT: Right.

22 MR. SWEENEY: And the new one came out on September
23 1st.

24 THE COURT: Right.

04:02:33

25 MR. SWEENEY: So we do have that.

1 THE COURT: Okay. That one is substantially similar
2 but was removing the term that Overwell agree.

3 MR. SWEENEY: Correct.

4 THE COURT: Okay. Otherwise, do you have any other --
04:02:53 5 or do you believe that you're missing any other material
6 information for the voting stockholders?

7 MR. SWEENEY: I think absolutely probably the most
8 critical piece of information that needs to be provided,
9 counsel referenced it. It's not just \$350,000, but the deal
04:03:11 10 with TT provides for a fourth quarter revenue tail where you
11 get four times IBIDTA, and then for 2018 you get eight times
12 IBIDTA. Nobody knows what that is. Nobody knows what the
13 company has projected those numbers to be.

14 So while Mr. Widerhorn comes out and says that could
04:03:37 15 be \$16 million if we have \$2 million of IBIDTA next year, well,
16 what are the odds we're going to have \$2 million of IBIDTA next
17 year? Have you done some sort of projection analysis with
18 regard to that? That apparently is the largest component of
19 this deal according to him.

04:03:57 20 Now, if he comes in and says that number is really
21 zero, that we're not going to have revenue in the fourth
22 quarter because we're not going to have anybody, that 2018 is
23 going to be a development year because all of our key personnel
24 are fixing this algorithm to would make it work, well, then
04:04:17 25 someone who comes in and offers them 500 grand flat would be

1 giving them a better deal than someone who offers them 350 with
2 a chance at zero. So how the company has decided that that's
3 actually going to make the shareholders money is a critical
4 fact which we don't have.

04:04:31

5 MS. CHOSLOVSKY: So, Judge, I don't think this is too
6 helpful for you given your ruling, but the short answer is that
7 when new notice goes out, assuming new notice will go out,
8 meaning if it's futile, it's futile, meaning if TT says forget
9 it, then forget it. But if as I hope your premise is correct

04:04:55

10 that they've been around and they're going to stick around
11 because they see some value here, if you're right and we
12 renotece, what they're saying in a nice way is: We want more
13 information.

04:05:06

14 We've given all the financial results there are of the
15 company. That's why I have a binder of potential exhibits
16 showing what they've received by e-mail. But if they don't
17 think it's sufficient, they'll be back before you. But the
18 notion of what will those generate, they will generate zero
19 unless the only buyer, TT, sticks around because there is no
20 company anymore. There's no more company.

04:05:23

21 THE COURT: But what they're saying is that obviously
22 somebody did some analysis at some point along the way to value
23 what this revenue stream is, right?

24 MR. SWEENEY: Right.

04:05:48

25 THE COURT: So what they are asking for is that

1 analysis so that they can say: This is completely unfounded
2 and ridiculous, so let's hustle up and go out and find somebody
3 to come up with a better deal, or this is worth more than I
4 thought.

04:06:16

5 MR. CHOSLOVSKY: I couldn't agree more.

6 THE COURT: This is great.

04:06:30

7 MR. CHOSLOVSKY: If there's an analysis, we will
8 happily provide it. The question of is it four times zero for
9 the fourth quarter of this year, and for next year's revenue is
10 it eight times zero or is it eight times some other number, if
11 there's an analysis there's no reason for us not to share that
12 analysis. We will be happy to share that analysis.

04:06:48

13 But what I'm trying to impart is that A, I don't think
14 there is an analysis and, B, every single day, if there was an
15 analysis three months ago, it's probably meaningless today
16 because there is no company.

17 THE COURT: Well, your client is here, right?

18 MR. CHOSLOVSKY: The client is here, yes.

04:07:00

19 THE COURT: Okay. Just ask him. He would know. Just
20 ask him. Has an analysis been done?

21 MR. CHOSLOVSKY: I don't believe so. We will find
22 out.

23 THE COURT: Go ahead and ask him.

04:07:10

24 MR. CHOSLOVSKY: We'll find him. I think he's across
25 the street. Give me a moment, Judge.

1 (Discussion off the record.)

2 THE COURT: All right. So other than that analysis,
3 is there anything else that plaintiff needs?

4 MR. SWEENEY: That is the critical element.

04:07:31

5 THE COURT: All right. Then we'll have taken care of
6 that as soon as you hear from your client and we find it out.
7 Okay. So otherwise that claim, once we establish this issue,
8 would be moot, right?

04:08:00

9 MR. SWEENEY: So what happened was we were told on
10 August 16th that the numbers were being restated by the
11 accounting and legal teams that Mr. Widerhorn had hired. A
12 subsequent e-mail from a shareholder asked who were the
13 accounting firms and who were the law firms. He said: Well,
14 actually I just called my guy who prepares my tax returns and
15 asked him questions. I did the accounting.

04:08:21

16 So I think we got that, what he did. So assuming
17 that's all there was, it sounded like there was something much
18 more significant on August 16th when he said that all the
19 financial statements for the company had been restated back to
20 inception. So people thought: What does that mean? Can we
21 see the old ones? Can we see the new ones? Can we see the
22 report from the accounting firm as to what changes were made
23 and why they were made?

04:08:45

24 Then it turned out he did them.

04:08:59

25 THE COURT: Okay.

1 MR. SWEENEY: So that's a long way of saying we did
2 get what he did.

3 THE COURT: All right. So then there's nothing out
4 there outstanding on that. In terms of the financial health of
5 Neurensic, based on that, you've gotten what there is.

6 MR. SWEENEY: Yes.

7 THE COURT: All right. So that's moot. Okay. So
8 that takes care of likelihood of success. Then with regard to
9 irreparable harm and adequate legal remedy, if the sale were to
10 go forward on a vote that violated Delaware law for a duly
11 noticed vote, I find that that would cause irreparable harm for
12 the reasons that I have stated previously and that there is an
13 inadequate remedy at law because the plaintiffs would not be
14 able to put together a better deal and not have the
15 opportunities to recoup their investments.

16 Additionally, if the assets are sold while Neurensic
17 is in dire financial straits and that sale then is later voided
18 because it was improperly conducted, then there would not be a
19 company for the assets to return later, and that again would
20 cause irreparable harm.

21 I finally find that the balance of harms weighs
22 against the sale of the assets to Trading Technologies, that
23 Delaware courts enjoin the sale of substantially all assets of
24 a corporation when there's no vote called on at least 20 days'
25 notice. Overwell faces irreparable harm if the sale is to go

1 forward because it's deprived of its right as stockholders to
2 vote on a sale of substantially all of the corporate assets.
3 Widerhorn -- well, both defendants will suffer less irreparable
4 harm from any temporary delay from an order declaring that
5 Neurensic's assets cannot be sold without stockholder approval.
6 The two directors say they won't be taking any perks, payment,
7 or employment from Trading Technologies, so they won't lose any
8 planned next employment or consultant positions with Trading
9 Technologies.

10 I don't believe that defendants have presented
11 sufficient evidence showing that the balance of harms weighs in
12 their favor and against plaintiff. As I said before, if the
13 notice is improper, that's a sufficient basis on which to void
14 the sale. Trading Technologies has been around and negotiating
15 with Neurensic since May. Any extension beyond September 8th
16 or September 13th is not going to substantially harm either
17 Trading Technologies or substantially devalue Neurensic, and I
18 find that the balance of harms, while not hit out of the park
19 in favor of the plaintiff, does favor a TRO.

20 In terms of the public interest, stopping an abuse of
21 Delaware law preserves the rule of law and preserves the rights
22 of the stockholders in Neurensic. So considering all of the
23 factors, a narrowly tailored temporary restraining order that
24 declares that the two directors cannot pursue the sale of
25 assets to Trading Technologies without a properly noticed vote

1 by voting stockholders is justified.

2 In terms of a bond, Overwell asserts that it should
3 not pay a bond because of the preferred stockholder agreement.
4 However, the preferred stockholder agreement only applies to a
5 breach or threatened breach by each party to the agreement of
6 any of its obligations under the stockholder agreement.

7 Because Overwell alleges breaches and threatened breaches of
8 the bylaws and Delaware law and not breaches of the preferred
9 stockholder agreement, Overwell presents no reason to excuse a
10 bond. The appropriate bond should capture the diminution in
11 value of the delay of the sale of Neurensic's assets, so the
12 bond should cover any diminution caused by a 14-to-28-day delay
13 in finalizing and approving the deal.

14 All right. Is there anything else we need to take up?

15 MR. CHOSLOVSKY: The only thing I can think of, we
16 enjoy a good relationship with counsel. So we will discuss
17 this last factor of the bond, and I would hope we could reach
18 some sort of agreement. If we can't, we'll bring something
19 before you. Otherwise, this is going to sound cheesy, but we
20 appreciate your insight, and if TT sticks around we will
21 renotice.

22 THE COURT: Okay.

23 MR. SWEENEY: Was there a response for the analysis?

24 MR. NEVILLE: Oh, yes. An analysis was provided I
25 think yesterday or a couple days ago for 2017 and '18.

1 THE COURT: Okay.

2 MR. CHOSLOVSKY: So something was sent by e-mail, but
3 let me be very clear. If there's any other analysis that has
4 been done, there's no reason not to share it. We believe it's
04:16:12 5 already been provided. To make this real, Judge, and not
6 academic, our client hasn't received a paycheck in over a year.
7 There are no -- I shouldn't say no employees left. There's
8 four or less employees left who have been working for free, so
9 to speak, so we can't make anything which doesn't exist. But
04:16:34 10 any analysis that's been done will be provided. There's no
11 reason not to.

12 THE COURT: That's all we're asking for.

13 MR. CHOSLOVSKY: If they can find an offer in these 20
14 days, wow, we'll be the happiest people there.

04:16:48 15 THE COURT: Well, that's the thing. You know, I
16 understand that defendants think this was an exercise in
17 futility, and being a very pragmatic person myself, I
18 understand the argument that in 20 days you can be right back
19 where you are at best, where Trading Technologies is still
04:17:14 20 willing to do the deal for the same amount of money. Maybe
21 everybody in the end will get their investment back through the
22 revenue trail this year and next year, and that would be great,
23 right? It could also be at the end of 20 days that Trading
24 Technologies is not interested and there are no other buyers
04:17:41 25 and the company goes into bankruptcy and everybody loses. I

1 understand that, too. Obviously, that's not where anybody
2 wants this to end.

3 However, we have rules and procedures for a reason,
4 and I can't go around saying that it doesn't apply because
04:18:11 5 there are somehow these extenuating circumstances that are of
6 the defendants' own creation. I can't do that. So hopefully
7 it all works out. If Trading Technologies, you know, has been
8 interested since May, I think a couple of weeks is not going to
9 make that much more of a difference, and we'll see what

04:18:40 10 happens.

11 So why don't you get together and do a proposed order
12 for the TRO, send it back to each other and then send it to me
13 in my proposed order e-mail box, and then I'll get it entered.
14 Okay?

04:18:55 15 MR. SWEENEY: Thank you.

16 MS. SCHARKEY: Thank you, Your Honor.

17 MR. CHOSLOVSKY: Thank you, Judge.

18 THE COURT: You're welcome.

19 (Proceedings concluded.)

20 C E R T I F I C A T E

21 I, Patrick J. Mullen, do hereby certify that the
22 foregoing is a complete, true, and accurate transcript of the
23 proceedings had in the above-entitled case before the Honorable
SARA L. ELLIS, one of the judges of said Court, at Chicago,
Illinois, on September 7, 2017.

24 /s/ Patrick J. Mullen
25 Official Court Reporter
United States District Court
Northern District of Illinois